Supreme Court, U.S.
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No. 97-0095

In The

Supreme Court of the United States

October Term, 1996

UBC SOUTHERN COUNCIL OF INDUSTRIAL WORKERS, LOCAL UNION NO. 2713,

Petitioner,

vs.

BRUCE HARDWOOD FLOORS, A DIVISION OF TRIANGLE PACIFIC CORPORATION,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Have the lower courts correctly adhered to the standard of judicial review of labor arbitration awards as clearly articulated by this Court?

2. Is there a conflict in the circuits as to the authority of courts to set aside arbitral awards?

STATEMENT OF INTERESTED PARTIES

Pursuant to Supreme Court Rule 29.6, Respondent Bruce Hardwood Floors discloses that it is a wholly-owned subsidiary of Triangle Pacific Corporation, 16803 Dallas Parkway, Dallas, Texas 75248.

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APPENDIX

Appendix A — Article 9, Section 3 of the Collective Bargaining Agreement 1a

REASONS FOR DENYING THE WRIT

The first question as presented by the Petitioner UBC Southern Council of Industrial Workers ("Petitioner" or "Union")[1] exposes its attempt to implore this Court to review a singular decision which it finds disfavorable. The Union argues that the Fifth Circuit reversed a district court decision and vacated an arbitral award because the Court read an express provision differently than the arbitrator. In actuality, the Fifth Circuit found that the arbitrator refused to apply an express contractual provision and in so doing, exceeded his arbitral authority. *Bruce Hardwood Floors v. UBC, Southern Council of Industrial Workers, Local Union No. 2713*, 103 F.3d 449 (5th Cir. 1997). As further demonstration of the arbitral excess in the case, the Court of Appeals noted that the arbitrator formulated his own unique discipline for the admitted offender instead of applying the bargained-for discipline for the offense as agreed upon by the parties.[2] Simply because the Union disagrees with the Fifth Circuit's holding, it now attempts to overturn a decision which presents no novel or pivotal issues of law. The Fifth Circuit's reasoning was in line with this Court's holdings in the

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1. "Whether in an action under Section 301 of the Labor Management Relations Act, it is permissible for a court to set aside an arbitrator's decision because it believes the arbitrator misread the collective bargaining agreement."

2. The Agreement between the parties requires immediate discharge for certain listed offenses, including the immoral conduct of lying to which the grievant expressly admitted. Although the arbitrator found that the lying in fact had occurred, he deemed it worthy only of progressive discipline. Nevertheless, he failed to employ the progressive discipline as outlined in the Agreement, but mandated an arbitrary ten (10) day suspension for the grievant. The Fifth Circuit held that the arbitrator's actions contravened the prohibition in the Agreement restricting arbitrators from adding to, amending or departing from the terms of the Agreement. *Bruce Hardwood Floors v. UBC*, (Petitioner's Appendix C[5], hereinafter referred to as "Pet. App.").

Steelworkers Trilogy,[3] as well as this Court's decision in *International Paperworkers Union AFL-CIO v. Misco, Inc.*, 484 U.S. 29 (1989).

As an alternative to its transparent endeavor to use this Court to review a correctly decided case, the Union appeals to this Court to redefine a clearly stated federal policy regarding enforcement and vacating of labor arbitration awards. The Union erroneously argues that there is a conflict among the circuits in applying the standard articulated by this Court for judicial review of arbitration awards. *See Steelworkers Trilogy*; *Misco, Inc.* However, the Union's question as presented in its Petition for Certiorari ("Petition") incorrectly states that there is a "federal policy of enforcing labor arbitration awards." Although this Court has pronounced that arbitration awards are to be given great deference, this is a far cry from a policy to *enforce* arbitration awards or one, in other words, which insulates them from being vacated where appropriate. Accordingly, in reviewing arbitral awards, the federal courts of each circuit have consistently applied the principle enunciated by this Court that an arbitrator may not merely "dispense his own brand of industrial justice" but is confined to interpretation and application of the collective-bargaining agreement. *United Steelworkers of Am. v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 587, 4 L. Ed. 2d 1424, 80 S. Ct. 1358 (1960). In short, the questions presented in the Union's Petition do not raise issues suitable or ripe for resolution by this Court, and the Petition therefore should be denied.

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3. *Steelworkers v. Enterprise Wheel and Car Corp.*, 363 U.S. 593 (1960); *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *Steelworkers v. American Manufacturing Co.*, 363 U.S. 564 (1960).

I.

LOWER COURTS HAVE CORRECTLY ADHERED TO THE STANDARD OF JUDICIAL REVIEW OF LABOR ARBITRATION AWARDS AS CLEARLY ARTICULATED BY THIS COURT.

A cursory examination of the relevant case law reveals that when reviewing labor arbitration awards, each circuit clearly enunciates this Court's well-settled standard of review. A closer scrutiny, however, discloses that the critical distinction among these decisions is the fact-specific implementation of this standard. Each case turns on the manner in which the particular issue in dispute should be decided, with regard to the particular wording of the collective bargaining agreement binding the parties *and* the arbitrator. Thus, the specific wording of the collective bargaining agreement ("CBA" or "contract") between a company and a union governs an arbitrator's decision.

Although the Union's Petition initially appears to present a broad question regarding application of federal labor policy in the circuits, its analysis makes clear that the real issue it seeks to resolve is whether courts are properly reviewing arbitration decisions which distinguish "just cause" and "listed offense" discharges. However, it is virtually impossible to limit this Court's review to such a fact-specific inquiry. Because each contract is negotiated and bargained-for between different companies and unions, each contract is distinct and tailored to fit the needs and preferences of the different parties. The crucial inquiry is therefore not whether an arbitrator correctly found that an offense should have resulted in a "just cause" or a "listed offense" discharge, but rather whether the arbitrator exceeded the scope of the parties' submission in making this determination.

What is certain is that all the circuit courts of appeal have made it clear that an arbitrator has no authority to disregard the clear expression of the parties by ignoring the explicit language of a contract. It is the arbitrator's job to determine what the contract says, and if not clear, what the parties intended. He cannot substitute his own judgment with respect to application of a contract which contains no ambiguity. Thus, all courts have correctly held, as directed by this Court, that an arbitral award should not be enforced if the arbitrator's words manifest an infidelity to his obligation to interpret a collective bargaining agreement. *Enterprise Wheel Car Corp.*, 363 U.S. at 597. Furthermore, where an arbitrator utilizes outside sources or bases his award on thoughts or feelings of equity and fairness not articulated in the contract, his award cannot stand. *See Leed Architectural Products, Inc. v. United Steelworkers of America, Local 6674*, 916 F.2d 63 (2nd Cir. 1990); *Pennsylvania Power Co. v. Local Union #272 of the Int'l Bhd. of Elec. Workers*, 886 F.2d 46, 48 (3rd Cir. 1989); *Houston Lighting & Power Co. v. IBEW*, 71 F.3d 179 (5th Cir. 1995); *Cement Divisions, National Gypsum Co. v. United Steelworkers of America*, 793 F.2d 759 (6th Cir. 1986); *Tootsie Roll Indus. v. Local Union No. 1, Bakery Workers' Int'l Union*, 832 F.2d 81 (7th Cir. 1987); *Riceland Foods, Inc. v. United Bhd. of Carpenters, Local 2381*, 737 F.2d 758 (8th Cir. 1984), *cert. denied*, 471 U.S. 1102, 85 L. Ed. 2d 845, 105 S. Ct. 2327 (1985);

Contrary to the arguments made by the National Academy of Arbitrators and the American Arbitration Association in their Amicus Briefs, to allow an arbitrator to substitute his judgment for that of a Company's management would more so undermine the nature and purpose of alternative dispute resolution than would limiting a party's right to seek judicial review of an award made in excess of arbitral authority. In the instant case, rather than the decision of the arbitrator being supplanted by a decision of the court, the arbitrator supplanted the intent of the parties.

When an arbitrator inserts his own brand of industrial justice into an arbitration award, § 301 of the Labor Management Relations Act provides a "check and balance" to restrict such arbitral excess. This is necessary for the continuance of a dependable mechanism to reconcile differences between companies and unions which have chosen to express the rules and regulations governing them by means of collective bargaining agreements. It is important to note that both companies and unions may invoke § 301 to appeal and seek vacation of arbitration awards which contravene these collective bargaining agreements, and both groups have generously utilized that right where necessary. Some appeals have met with success, others have not. Each case turns on the lower court's application of this Court's standard; however, the important point is that there exists the opportunity for review when a party feels an arbitrator has betrayed his obligation to apply the terms and conditions within the collective bargaining agreement.

In the instant case, Respondent Bruce Hardwood Floors ("Bruce Hardwood" or "Company") exercised its prerogative to remedy an erroneous arbitration award which failed to apply discipline as agreed upon and provided for in its contract with the Union. Because the Fifth Circuit correctly applied this Court's standard in reviewing the lower court decision and vacating the arbitration award, there is no reason for this Court to grant certiorari to review the Fifth Circuit's decision. This Court has clearly articulated the standard of review employed by the Fifth Circuit and the remaining circuits with respect to judicial review of labor arbitration awards and need not further expound on this issue.

II.

THERE IS NO CONFLICT IN THE CIRCUITS AS TO THE AUTHORITY OF COURTS TO SET ASIDE ARBITRAL AWARDS.

In its attempt to establish a non-existent split in the circuits surrounding review of labor arbitration awards, Petitioner correctly acknowledges that the First and Fifth Circuits have directly applied this Court's admonition that an arbitrator's authority is derived solely from the underlying CBA and cannot reflect his own brand of industrial justice. *See Georgia Pacific v. Local 27, United Paperworkers Int'l Union*, 864 F.2d 940 (1st Cir. 1988); *Delta Queen Steamboat Co. v. District 2, Marine Engineers Beneficial Ass'n*, 889 F.2d 599 (5th Cir. 1989), *reh'g denied*, 897 F.2d 746, *cert. denied*, 498 U.S. 853 (1990). In applying the standard to unique fact patterns and particular contractual language, those circuits have uniformly held that where a CBA limits an arbitrator's discretion, the arbitrator may not modify the penalty imposed by the employer. *S.D. Warren Co. v. United Paperworkers Int'l Union, Local 1069*, 846 F.2d 827 (1st Cir. 1988), *cert. denied*, 488 U.S. 992 (1988); *Container Products, Inc. v. United Steelworkers of America*, 873 F.2d 818 (5th Cir. 1989).

For instance, in *Georgia-Pacific* and *Delta Queen*, the circuit courts found that where an employee may be terminated for a listed offense *or* for just cause, an arbitrator's finding that the listed offense occurred precludes any further just cause inquiry because to do so would ignore the "plain language" of the contract. Despite the argument made by the National Academy of Arbitrators ("National Academy") in its Amicus Brief, the circuits are not split as to their application of this "plain meaning" standard. As stated above, each contract is different; therefore, each decision will be different in its resolution of the

facts to the specific contract language at issue in the case. Where there is any question as to what was intended, the arbitrator must take language as its plain meaning. If the arbitrator does not follow the plain meaning (in the absence of evidence of another meaning), then it is obvious that the arbitrator is going beyond the limits of the contract to substitute his own judgment. That is clearly what the arbitrator did in this case — and what he admits to doing.

As the National Academy's Brief surmised, the Company notes that this Court stated in *Misco, Inc.*, 484 U.S. at 38, that an arbitrator "may not ignore the plain language of the contract." Clearly, an arbitration decision cannot draw its essence or arguably apply a contract when it ignores the contract language. Despite this clear mandate from the Supreme Court, the National Academy argues that the "common law of the shop"[4] is that the seriousness of the offense will govern the degree of the penalty imposed. The National Academy states that "[i]n less serious cases, arbitrators generally *insist* upon progressive discipline and reduce the penalty of discharge to a suspension." (Nat'l Academy Brf., p. 4) (emphasis added). However, it is not for an arbitrator to "insist" on anything. Rather, it is for the arbitrator to follow the contract and apply its plain meaning. In the instant case, there was nothing in the Agreement's progressive discipline section which applied to lying. Thus, the Fifth Circuit properly found that there was no support in the record for the arbitrator's modification of the employee's discharge to a suspension.

Although the First and Fifth Circuits have been in the forefront in rectifying the arbitral excess inherent in some awards, the other circuits have also consistently rejected awards which fail to draw their essence from the underlying collective

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4. There is no universal "common law of the shop." It will vary with each industry and each collective bargaining agreement.

bargaining agreement. Petitioner states that certain circuits are in conflict with the First and Fifth Circuits with respect to an arbitrator's authority to set aside a discharge, however, this is inaccurate and misrepresents the posture of the other circuits.

For instance, in the Eighth Circuit decision cited by Petitioner, *Midwest Coca-Cola Bottling Co. v. Allied Sales Division*, 89 F.3d 514 (8th Cir. 1996), the Court of Appeals distinguished its holding in that case from its other decisions involving different contract language. The Appeals Court noted that the CBA in *Midwest Coca-Cola* was unlike those contracts which allow companies to discharge employees for specific offenses *as well as* for just cause. The court discussed *Truck Drivers & Helpers Union Local 784 v. Ulry-Talbert Co.*, 330 F.2d 562 (8th Cir. 1964), in which a company discharged an employee for falsifying a work record. In *Truck Drivers*, the proper cause provision in the CBA was immediately followed by a list of discharge offenses, including dishonesty. Because proper cause was explicitly defined for the arbitrator to include specific offenses, and the employee's conduct fell within one of the listed offenses, the discharge was proper under the terms of the contract. The *Midwest Coca-Cola* court also distinguished *Truck Drivers* in that the contract provided that dishonesty "*shall* be grounds for discharge." *Midwest Coca-Cola*, 89 F.3d at 517.[5]

The Agreement between Bruce Hardwood and the Union is similar to the one in *Truck Drivers*. First, the Company retains the express right to discipline and discharge employees for just cause. The next paragraph lists offenses which will result in immediate discharge. (Pet. App. E3). Therefore, the parties

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5. The *Midwest Coca-Cola* court also distinguished its holding in *St. Louis Theatrical Co. v. St. Louis Theatrical Brotherhood Local 6*, 715 F.2d 405 (8th Cir. 1983), in which it decided that the limiting terms in the CBA prevented an arbitrator from evaluating the discipline imposed by the company.

agreed as to what would constitute just cause for discharge. The Agreement did not contemplate that an arbitrator could find that an employee committed one of the listed offenses and then further consider whether just cause existed. Such an inquiry would be redundant and superfluous, and contrary to the intentions of the parties. In addition, the Agreement provides that violation of a listed offense "shall" result in discharge. Again, contract language is key to the determination of whether an arbitrator exceeded his authority and the Fifth Circuit properly concluded that the arbitrator did just that in the lower case.

In another Eighth Circuit decision, *Coca-Cola Bottling Co. v. Teamsters Local Union No. 688*, 959 F.2d 1438, *cert. denied*, 506 U.S. 1013, 121 L. Ed. 2d 566, 113 S. Ct. 635 (1992), the Appeals Court determined that an arbitrator could not consider only a just cause provision under an agreement which provided an exclusive termination remedy where the employee violated specific work rules. The court found that:

> The arbitrator found a rules violation, and termination was the bargained-for result. The language of the last chance agreement upon this issue is unambiguous . . . [t]he arbitrator did not have authority to alter the agreement by interpreting unambiguous language in a way contrary to its plain meaning, while attempting to characterize his actions outside of his authority as fact-finding.

Id. at 1442.

The Seventh Circuit has likewise concluded that arbitrators must adhere to the intentions of the parties as expressed by the clear wording in the CBA. However, in support of its Petition, Petitioner cites *AOI, Div. of Apogee Coal v. District 12, United*

Mine Workers of America, 85 F.3d 1289 (7th Cir. 1996), in which the contract between the parties specifically required just cause for *any* termination. The arbitrator in that case determined that although the employee had engaged in conduct which could be just cause for discharge, the company did not take into consideration the employee's work record and seniority in making the just cause determination. Unlike the Agreement between Bruce Hardwood and the Union, the language in the AOI contract provided that violation of work rules "may," not "shall" result in discipline. That contract further gave the arbitrator the discretion to reinstate any employee he felt the company discharged without just cause. Thus, the arbitrator in that case was given liberty to expand on the meaning of "just cause" and to consider mitigating factors when making a determination of whether just cause existed. The parties in *AOI*, unlike the parties in the instant case, gave the arbitrator explicit license to make a broad just cause inquiry; therefore the arbitrator did not exceed his authority in reshaping the discipline imposed by the company in that case.

Despite its holding, the court in *AOI* noted that it would have concluded that the arbitrator had exceeded his role and would have refused to enforce the award

> if the arbitrator had specifically found that AOI had just cause to discharge [employee], but then stated something to the effect of "fairness dictates that [employee] shouldn't have been discharged,"

AOI, 85 F.3d at 1293. Therefore, the Seventh Circuit is in agreement with the other circuits that an arbitrator may not base his award on some policy or feeling outside the contract. *Accord Ethyl Corp. v. United Steelworkers*, 768 F.2d 180, 184-85 (7th Cir. 1985), *cert. denied*, 475 U.S. 1010, 89 L. Ed. 2d 300, 106

S. Ct. 1184 (1986). *Ethyl Corp.*, cited by Petitioner, involved an arbitrator's interpretation of a contractual vacation pay provision, not the issue presented by Petitioner — the existence of just cause for termination. In upholding the arbitrator's award of vacation pay, the Court in *Ethyl* stated:

> This is not to say that simply by making the noises — the noises of contract interpretation — an arbitrator can shield from judicial correction an outlandish disposition of a grievance. There are cases, such as our *Young Radiator* case cited earlier, where no hypothesis other than that the arbitrator was importing into the dispute his own ideas of industrial justice would be tenable, no matter what he said.

Ethyl Corp., 768 F.2d at 186. The issues in *Young Radiator Co. v. International Union, U.A.W.*, 734 F.2d 321, 325 (7th Cir. 1985), are more closely akin to those considered below by the Fifth Circuit. The arbitrator in that case improperly decided that although the underlying CBA gave the company the right to discharge employees for theft, an earlier admitted theft had to be the motivating cause for a later discharge based on an unproven theft. The Court found that in making this determination, the arbitrator injected his own opinion as to how the contract should be read, and was unfaithful to his duty to literally interpret the contract.

The Appeals Court in *Young Radiator* reached its conclusion despite the arbitrator's failure to find that the particular misconduct had occurred. In *Bruce Hardwood*, the Fifth Circuit's decision to vacate the arbitrator's award was supported by the fact that the arbitrator found the misconduct to have occurred, but still fashioned his own remedy outside the contract. This an

arbitrator cannot do because where "the language of the agreement is clear and unambiguous, and . . . the parties agreed to it, they are bound by it." *Tootsie Roll Indus. v. Local Union No. 1, Bakery Workers' Int'l Union*, 832 F.2d 81, 84 (7th Cir. 1987) (arbitrator's award declining to apply appropriate contract provisions properly denied as outside agreement).

Only one of the Third Circuit cases cited by Petitioner involved the issue of just cause verses discharge for an express contractual reason. In *Tanoma Mining Co. v. Local 1269*, 869 F.2d 745 (3rd Cir. 1990), the Appeals Court reversed a district court's vacation of an arbitral award because the arbitrator found some support in the record for his decision. That case is distinguishable from the instant case in that it involved hotly contested and disputed historical facts about a preferential hiring agreement. In the present case, there is no dispute that the grievant admitted she lied to her employer and the arbitrator acknowledged that the grievant had lied. However, the arbitrator ignored his own finding that the grievant engaged in immediate discharge misconduct pursuant to the contract and fashioned his own discipline.

The case of *News America Publications v. Local 103*, 918 F.2d 21 (3rd Cir. 1990), involved a dispute over an economic package. Only in *UTU Local 1589 v. Suburban Transit Corp.*, 51 F.3d 376 (3rd Cir. 1995) did the arbitrator consider whether an employee was discharged for proper cause. Unlike the Agreement between Bruce and the Union, proper cause was not further defined in *UTU* to include a list of discharge offenses. Therefore, the court could not find that the arbitrator engrafted provisions on the contract when interpretation of just cause was left open for him. *Id.* at 380.

Finally, Petitioner examines two cases from the Sixth Circuit involving the same Company and Union at odds in the present

case. In *Bruce Hardwood Floors v. Southern Council of Industrial Workers*, 8 F.3d 1104 (6th Cir. 1993), the Company and the Union are the same, however, the contract language is substantially different from that considered here by the Fifth Circuit. In *Bruce Hardwood v. Southern Council*, the applicable contract language allowed the just cause analysis of an arbitrator to include "appropriate mitigating or aggravating circumstances." *Id.* at 1108. Additionally, the contract provided only that an employer "may" discharge an employee for committing one of a list of enumerated offenses. The arbitrator therefore considered a number of fact-specific mitigating factors in reinstating an employee who had committed a listed offense. The district court found that the arbitrator's award did not draw its essence from the contract, but the Sixth Circuit disagreed. The Appeals Court found that the arbitrator made an award consistent with the express contract provision to consider mitigating circumstances as opposed to his own "general considerations of fairness and equity." *Id.* Therefore, the precise language contained in the CBA was critical to the Sixth Circuit's holding.

The contract language which arguably gave the arbitrator the opportunity to consider outside factors in *Bruce Hardwood v. Southern Council* was also at issue in another Bruce Hardwood case, which the Sixth Circuit stated, *in dicta*, was wrongly decided by the district courts. *Southern Council of Industrial Workers v. Bruce Hardwood Floors*, 784 F. Supp. 1345 (M.D. Tenn. 1992).[6] The Sixth Circuit admitted, however, that in the Middle District of Tennessee case, the arbitrator overstepped his bounds by imposing on the Company a requirement that it

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6. Petitioner incorrectly cites this case as being appealed to and reversed by the Sixth Circuit. (Pet., p. 16). This is not correct. The case of *Southern Council v. Bruce Hardwood Floors* from the Middle District of Tennessee was never appealed, and the Sixth Circuit's mention of it in the *Bruce Hardwood v. Southern Council* case appealed from the Western District of Tennessee was merely dicta.

conduct a formal investigation and hearing before discharge. In any event, the basis of the Sixth Circuit's analysis was the inherent ambiguity in the term "just cause" within the CBA. The ambiguities that existed in the CBA considered by the Sixth Circuit do not exist in the CBA considered by the Fifth Circuit.

The reason for not respecting arbitration awards that are contrary to the express language of the contract is that it is evidence the arbitrator has gone on a frolic of his own and is not interpreting the contract. This is especially true where contracts contain language restricting an arbitrator's authority. Such limiting language is often considered by courts in reviewing whether an arbitrator properly applied a CBA. For instance, the CBA examined by the Fifth Circuit restricted the arbitrator's authority to venture outside the Agreement by prohibiting him from adding to, amending or departing from the terms of the Agreement. (Respondent's Appendix, Article 9, Section 3 at 1a). The arbitrator's exaction of his own penalty was rewriting of the Agreement contrary to the contract language that the arbitrator could not modify or change language in the Agreement.

In its zeal to overturn the decision of the Fifth Circuit, Petitioner has attempted to portray an invisible tension in the circuits with respect to vacating arbitrator awards. Petitioner's assertion that the Eighth, Seventh, Sixth, and Third Circuits are not in accord with the First and Fifth Circuits with respect to review of arbitration awards is misguided. In fact, the two Amicus Briefs submitted in support of the Petition cite cases from the Sixth and Seventh Circuits which are in line with the Fifth Circuit's decision. (Nat'l Academy of Arbitrators Brf., pgs. 3-4; American Arbitration Ass'n Brf., pg. 12).[7] Petitioner

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7. *Polk Brothers, Inc. v. Chicago Truck Drivers*, 973 F.2d 593, 599 (7th Cir. 1992); *Ficks Reed Co. v. Local 112*, 965 F.2d 123, 125 (6th Cir. 1992); *Browning-Ferris Industries of Tennessee, Inc. v. Teamsters Local Union No. 984*, No. 90-5933, 1991 U.S. App. LEXIS 24760 (6th Cir. Oct. 10, 1991).

conveniently selected cases from those circuits in which the courts refused to set aside arbitration awards, notwithstanding the particular factual circumstances and contractual language at issue in the cases. However, the cases cited by the Petitioner are all factually dissimilar and thereby distinguishable from the instant case. The factual distinctiveness of the cited cases nullifies Petitioner's argument that those cases prove the existence of a "recurring question of law on which the circuits are squarely in conflict." (Pet., p. 11). Nevertheless, Petitioner uses this unsubstantiated assertion of circuit conflict to unreasonably ask this Court to restate an already clear standard for review of arbitration awards.

Furthermore, Petitioner has failed to address whether the remaining circuits have adhered to the standard established by this Court in reviewing arbitral awards. For instance, the Second Circuit has set aside arbitration awards which go beyond express contract terms and reflect the arbitrator's own notions of industrial justice. *See Hoffman Printing, Inc. v. Graphic Communications Int'l Union, Local 261*, 950 F.2d 95 (2nd Cir. 1991); *Leed Architectural Products, Inc. v. United Steelworkers of America, Local 6674*, 916 F.2d 63 (2nd Cir. 1990); *In re Marine Pollution Service*, 857 F.2d 91 (2nd Cir. 1988).

Also, the Fourth Circuit has refused to uphold an arbitration award in which

> the arbitrator manifested a disregard for the terms of the submission and a determination to exceed, if necessary, the limits of the authority and power conferred upon him. This we cannot approve.

Textile Workers Union v. American Thread Co., 291 F.2d 894, 899 (4th Cir. 1961).

More recently in *Mountaineer Gas Company v. Oil, Chemical & Atomic Workers Int'l Union*, 76 F.3d 606, 608, *cert. denied*, 136 L. Ed. 2d 38, 117 S. Ct. 80 (1996), the Fourth Circuit affirmed a district court decision to vacate an arbitral award which failed to draw its essence from the CBA. In that case, the company retained the authority under its drug policy to discharge an employee found to be in violation of the policy. The arbitrator found no proper cause for discharge because in his opinion, the policy should not have applied to a long-term employee with an unblemished work history, despite the contract's express prohibition against the arbitrator amending, adding to or subtracting from the CBA. The Court of Appeals agreed with the district court that the arbitrator was simply using the words "proper cause" as a loophole to bypass the mandatory language of the contract and implement his own brand of industrial justice. Therefore, like the Fifth Circuit in the case below, the Fourth Circuit has rejected an arbitrator's blatant effort to infuse "his personal feelings and sense of fairness into the award by creating an entirely new remedy." *Mountaineer Gas*, 76 F.3d at 610.

The Ninth and Tenth Circuits also have vacated arbitration awards which fail to draw their essence from the collective bargaining agreement. *Howard P. Foley Co. v. IBEW*, 789 F.2d 1421 (9th Cir. 1986); *International Union of Operating Engineers v. Kerr-McGee Refining Corp.*, 618 F.2d 657 (10th Cir. 1980). In *Kerr-McGee*, the lower court held that an arbitrator improperly ignored a provision in the contract requiring termination for making false statements to obtain sick leave. In that case, the Tenth Circuit found it to be well-settled that an arbitration award may not be contrary to the express language of the agreement. *Accord Fabricut, Inc. v. Tulsa General Drivers*, 597 F.2d 227 (10th Cir. 1979); *Mistletoe Exp. Service v. Motor Expressmen's Union*, 566 F.2d 692 (10th Cir. 1977).

Finally, the Eleventh Circuit concurs with the other circuits that unauthorized action by an arbitrator which is contrary to the CBA will not be provided deference. *Warrior & Gulf Nav. Co. v. United Steelworkers*, 996 F.2d 279 (11th Cir. 1993), *reh'g in banc denied*, 12 F.2d 221, *cert. denied*, 511 U.S. 1083, 128 L. Ed. 2d 462, 114 S. Ct. 1834 (1994); *Bruno's Inc. v. United Food and Commercial Workers Int'l Union, Local 1657*, 858 F.2d 1529 (11th Cir. 1988). In *Bruno's*, the Circuit Court held that

> Although we are mindful of the great latitude to be given to an arbitrator's interpretation of a collective bargaining agreement, the portion of the arbitrator's award that writes and imposes a new . . . policy on Bruno's in direct conflict with the express terms of the collective bargaining agreement was properly vacated.

Id. at 1532. Therefore, the law in all the circuits is clear — an arbitrator has a responsibility to adhere to the contract as submitted by the parties, especially when his authority is expressly limited by the terms of the contract, as it was in the Agreement between Bruce Hardwood and the Union.

One side will always be dissatisfied with the result of an arbitration hearing. However, Congress and this Court have provided a fair mechanism for the dissatisfied party to seek review of an arbitration decision with which it disagrees. The parties have utilized this mechanism in the present case and the Fifth Circuit has concluded that the arbitrator exceeded his authority in making his award. In reaching its decision, the Fifth Circuit properly stated and applied the rule of law surrounding review of arbitration awards as articulated by this Court. Certiorari should not be granted merely to provide the Union

another opportunity to plead its case, especially in light of the lack of conflict in the circuits regarding the application of the standard for review of labor arbitration awards.

CONCLUSION

This case does not merit further review by this Court. For the foregoing reasons, the Union's Petition for Certiorari should be denied.

Respectfully submitted,

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APPENDIX A — ARTICLE 9, SECTION 3 OF THE COLLECTIVE BARGAINING AGREEMENT

ARTICLE 9

ARBITRATION

* * *

Section 3 No arbitrator shall have authority to add to, amend or depart from the terms of this written Agreement in effect at the time of the occurrence of the grievance being arbitrated.